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No. 94-467

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LLOYD EDWIN HUMPHREYS
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE. 1

OBJECTION TO JURISDICTION. . . 6

ARGUMENT AND AUTHORITIES. . . 10

SUMMARY AND CONCLUSION 19

PRAYER . . . . . .

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES Page

Bryant v. State, 457 S.W.2d 72 (Tex.Civ.App.--Eastland 1970, writ ref'd n.r.e.) 18

Ex Parte Wall, 107 U.S. 265, 274, 2 S.Ct. 569, 576, 27 L.Ed. 552 (1882) 15

Musslewhite v. State Bar of Texas, 786 S.W.2d 437, 441 (Tex.App.--Houston [1st Dist.] 1990, writ denied) 18

O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988) 19

State Bar of Texas v. Heard, 603 S.W.2d 829 (1980) 12, 16

State v. Dancer, 392 S.W.2d 504, 509 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.) 18

United States v. Daniels, 617 F.2d 1980 (1980) 6

TABLE OF AUTHORITIES *cont.*

STATUTES AND RULES

26 U.S.C. §7201 2
Rule 1.06(O), Tex. R. Disc. P.. . 5
Rule 1.06(U), Tex. R. Disc. P.. . 5
Rule 8.01, Tex. R. Disc. P. . 4, 10
Rule 8.02, Tex. R. Disc. P. . . .10

Part VIII, Texas Rules of Disciplinary Procedure (1992); Former Article X, §26, State Bar Rules (1984); Former Article 320a-1, §6, Vernon Tex. Civ. Stat. (Vernon 1969) 15

STATEMENT OF THE CASE

This is a proceeding involving the compulsory discipline of an attorney for the conviction of an Intentional Crime. On or about August 21, 1991, Lloyd E. Humphreys, was convicted by a jury of the felony offense of Income Tax Evasion, in Cause No. CR-90-0009, styled United States of America v. Lloyd E. Humphreys, in the United States District Court for the Northern District of Iowa, Cedar Rapids Division.

Specifically, the jury found Humphreys guilty of the willful attempt to evade and defeat a large part of the tax due and owing by him to the United States for calendar years 1983, 1984, 1988, and 1989.

The jury also found Humphreys guilty of the misdemeanor offense of willful filing of a false tax return. The convictions are based on a violation of *26 U.S.C. §7201*.

On November 22, 1991, the Court sentenced Humphreys to a term of incarceration in the custody of the United States Bureau of Prisons for a period of six (6) months, eighteen (18) months, and twelve (12) months to run concurrently. Humphreys was further sentenced to a three (3) year term of probation upon release from prison. The Federal Court of Appeals for the Eighth Circuit affirmed Humphreys conviction in December 1992.

The State Bar of Texas commenced disciplinary action against

Humphreys pursuant to Part VIII of the Texas Rules of Disciplinary Procedure ("Compulsory Discipline").

A hearing was held before the Board of Disciplinary Appeals ("Board") on February 27, 1993. The Board dismissed the petition filed against Humphreys on April 22, 1993. A review of the statement of facts from the hearing reveals that the Board's decision was based upon the finding that the criminal offense of Tax Evasion did not involve moral turpitude.

The State Bar of Texas appealed the dismissal directly to the Texas Supreme Court. On January 5, 1994, the Texas Supreme Court reversed the decision of the Board of Disciplinary Appeals and entered a

judgment of disbarment against Humphreys. The Texas Supreme Court held that the felony offense of Tax Evasion was per se a crime involving moral turpitude and thus Humphreys was subject to the Texas compulsory discipline statutes.

APPLICABLE STATUTES

Rule 8.01, Tex. R. Disc. P. provides for the initiation of a Disciplinary Action seeking compulsory discipline by the Chief Disciplinary Counsel when an attorney licensed to practice law in Texas has been convicted of an Intentional Crime.

"Intentional Crime" means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime

involving misapplication of money or other property held as a fiduciary. *Rule 1.06(O), Tex. R. Disc. P.*

"Serious Crime" means barratry; **any felony involving moral turpitude**; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes. *Rule 1.06(U), Tex. R. Disc. P.*

At the hearing, there was no debate that the offense is a felony or that an essential element of the crime of willful tax evasion is proof of knowledge or intent. In fact, to sustain conviction for felony of willful tax evasion, the

government must establish beyond a reasonable doubt that the defendant acted willfully and knowingly with the specific intent to evade his income tax obligation, that there was a tax deficiency, and that there was an affirmative act constituting the evasion. *United States v. Daniels, 617 F.2d 1980 (1980).*

Rather, the only genuine issue raised was whether the crime was one involving moral turpitude.

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Lloyd E. Humphreys has failed to timely file his Petition. The Texas Supreme Court issued its judgment and original opinion on January 5, 1994. (See Petitioner's

Writ of Certiorari Appendix p. 2). On March 30, 1994, The Texas Supreme Court overruled Humphreys motion for rehearing and substituted a second opinion for that issued January 5, 1994. (App. 1). The judgment, however, remained unchanged. On May 11, 1994, the Texas Supreme Court overruled Humphreys second motion for rehearing. (App. 2).

Rule 13.4 provides that the time for filing a petition for writ of certiorari runs from the date of judgment or from the date of the denial of a petition for rehearing, but not from the date of the issuance of the mandate. In the case at hand, Humphreys second motion for rehearing was overruled on May 11, 1994. Thus, his petition

was due to be filed with this Court within ninety (90) days of May 11, 1994, i.e. August 9, 1994.

The date relied upon by Humphreys, June 13, 1994, is date of the issuance of the mandate by the Texas Supreme Court. (App. 3). Thus, Humphreys' petition is untimely and should be dismissed based upon lack of jurisdiction.

Nor has Humphreys established jurisdiction of this Court in accordance with either 28 U.S.C. §1257, Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. No federal question was decided by the state court of last resort. Nor does the case involve the validity of a State

statute in connection with the Constitution of the United States.

The primary question decided by the Texas Supreme Court was whether the felony offense of Tax Evasion is a crime involving moral turpitude. As the Court's opinion states, the overwhelming majority of jurisdictions considering the issue have determined that willful attempt to evade or defeat a tax is a crime involving moral turpitude and no court has held that this crime as a matter of law does not involve moral turpitude.

Therefore, this Court should deny Humphreys's petition for lack of jurisdiction.

ARGUMENT AND AUTHORITIES

Although couched in terms of national significance and universal application, what Humphreys truly seeks is a retrial of the criminal allegations which led to his conviction for Tax Evasion and a retrial of his disciplinary lawsuit. This is evident from his assertions that his conviction was void and his continued references to the "facts" surrounding his conviction.

In compulsory discipline proceedings, it is the judgment of conviction itself that forms the basis of the lawsuit. Furthermore, the record of the conviction is conclusive evidence of the attorney's guilt. *Rules 8.01 and 8.02, Tex. R. Disc. P.*. The

compulsory discipline scheme requires confidence and trust in the criminal justice system where a higher burden of proof is required for a conviction and stronger constitutional protections are afforded the defendant.

An inquiry into the facts is not appropriate for a determination of moral turpitude. If an inquiry into the facts is necessary to determine the issue of moral turpitude, the utility and efficiency of the compulsory discipline procedure will be eliminated. It is fruitless to pursue a compulsory discipline matter if the State Bar must introduce the facts which led to the attorney's criminal conviction.

Finally, the Texas Supreme Court has already held that the issue of whether a particular offense involves moral turpitude is strictly a question of law and is not a fact issue. *State Bar of Texas v. Heard, 603 S.W.2d 829 (Tex. 1980), supra.* It is the nature of the crime itself and how it bears upon an attorney's moral fitness to continue to practice law which governs the determination.

The major problem with delving into the facts of the underlying criminal conviction is the consequence of eroding the compulsory discipline procedures and ultimately unraveling the entire scheme. No intellectual distinction can be made for allowing a factual

inquiry into some offenses committed by lawyers but not others. If an inquiry into the facts of some crime is allowed, one could then argue that the facts are relevant in determining moral turpitude for offenses which have universally been declared to constitute moral turpitude, per se, such as theft. Thus, Humphreys argument concerning the right to a jury trial are without merit. There are no fact issues to be decided. The jury in the criminal case already determined the facts involving his conviction and a retrial of the criminal case is neither proper nor necessary in determining compulsory discipline. Thus, The Texas Supreme Court correctly held that the right to

jury trial is satisfied so long as the disbarred attorney's conviction was obtained in a court of competent jurisdiction by constitutionally adequate procedures.

Humphreys' petition essentially attacks the entire compulsory discipline procedure. Historically, in the area of discipline, lawyers who have been convicted of crimes have been viewed separately and apart from lawyers who have not been convicted of a crime but have nonetheless violated disciplinary rules of professional conduct. This is evident in light of the fact that since at least 1969, the Texas Supreme Court, in the exercise of its inherent power to regulate the practice of law, has seen fit to

provide for a separate and expedited procedure for disciplining lawyers who have been convicted of criminal acts. *See Part VIII, Texas Rules of Disciplinary Procedure (1992); Former Article X, §26, State Bar Rules (1984); Former Article 320a-1, §6, Vernon Tex. Civ. Stat. (Vernon 1969).*

As stated by the United States Supreme Court in *Ex Parte Wall, 107 U.S. 265, 274, 2 S.Ct. 569, 576, 27 L.Ed. 552 (1882)*:

> ". . . Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office, . . . It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and

preserve. . ."

The Texas Supreme Court in *State Bar of Texas v. Heard*, *603 S.W.2d 829, 834 (Tex. 1980)* stated:

> The practice of law is a license, not a right, and only person of **good moral character and fitness** are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands. [Emphasis Added]

Every Court's primary obligation is to maintain the standards of the legal profession so that public confidence in the profession may continue. The goal is to protect the public, the courts, and the profession against unsuitable practitioners. There are certain qualities which are highly essential

and desirable on the part of those who are to exercise the privileges and responsibilities of a member of the bar. They include honesty, integrity, fidelity to trusts, and good moral character. A lawyer's primary duty is to keep his own conduct above reproach because improper conduct by even a few attorneys lowers the prestige of the profession and its effectiveness in performing its duties and responsibilities.

Thus, the true concern for any Court is maintaining the standards of the profession and protecting the public by ensuring that members of this bar are worthy of continued admission through the possession of good moral character.

The constitutionality of the State Bar Rules has been unsuccessfully challenged throughout their enactment and implementation. The courts have recognized the State Bar Act and State Bar Rules as constitutional and valid. *State v. Dancer*, *392 S.W.2d 504, 509 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.)*. See also *Musslewhite v. State Bar of Texas*, *786 S.W.2d 437, 441 (Tex.App.--Houston [1st Dist.] 1990, writ denied)* [attorney disciplinary rule prohibiting false and misleading communications was not unconstitutionally vague]; *Bryant v. State*, *457 S.W.2d 72 (Tex.Civ.App.--Eastland 1970, writ ref'd n.r.e.)* [suspension during appeal of

criminal conviction constitutional]; *O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988)* [restriction on in-person solicitation constitutional].

The Texas Supreme Court did nothing more than follow the rules promulgated for disciplining lawyers who have been convicted of certain crimes and no basis exists for review by this Court of its decision.

SUMMARY AND CONCLUSION

Humphreys petition is untimely and thus he has failed to properly invoke jurisdiction of this Honorable Court. Furthermore, the constitutionality of the compulsory discipline scheme was not presented to the Texas Supreme Court nor

written on by the Court other than to the extent that the Court correctly held that the Ex Post Facto Clause of the United States Constitution prohibits laws that criminalize behavior retroactively. This holding is in accordance with decisions of this Court.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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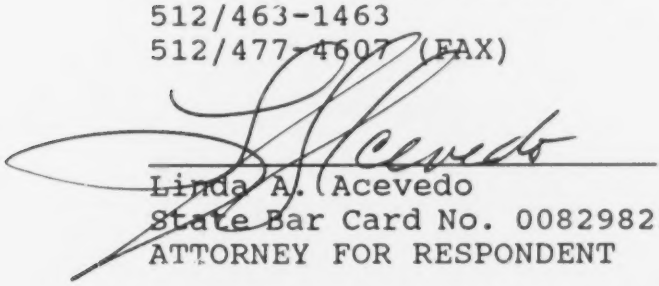
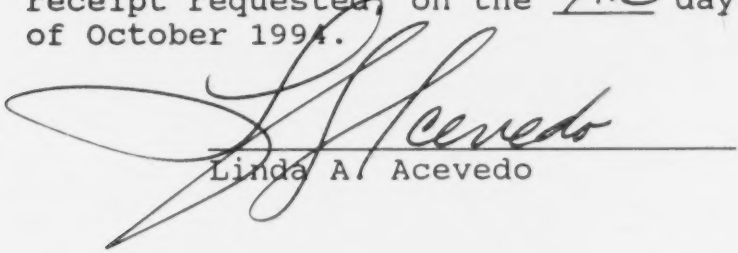


Linda A. Acevedo
State Bar Card No. 00829825
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Lloyd E. Humphreys, Petitioner, P.O. Box 8300-257, Dallas, Texas, 75205, by delivery of a true and correct copy to him by certified mail, return receipt requested, on the 7th day of October 1994.



Linda A. Acevedo

APPENDIX

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

Today, the Supreme Court of Texas overruled the motion for rehearing in the above-referenced cause and delivered the enclosed opinion which is substituted for that of January 5, 1994, which is today withdrawn; however, the judgment remains unchanged. Justice Doggett joins in the judgment only.

Signed: March 30, 1994

Respectfully yours,

John T. Adams, Clerk

Peggy Littlefield,
Chief Deputy Clerk

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

Today, the Supreme Court of Texas overruled the second motion for rehearing, as amended, in the above-referenced cause. State Bar's motion to direct mandate to the Board of Disciplinary Appeals to enter judgment of disbarment is dismissed as moot.

Signed: May 11, 1994

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

The judgment of the Supreme Court of Texas is now final in the above-referenced cause. As Rule 186, Tex. R. App. P., has been satisfied, we have issued the mandate as of today.

Signed: June 13, 1994

Sincerely,

John T. Adams, Clerk

by _____
Courtland Crocker,
Deputy